BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DELMAR HOLLON	)	
Claimant	)	
VS.	)	
	)	Docket No. 222,565
SEDGWICK COUNTY	)	
Respondent	)	
Self-Insured	)	

ORDER

Respondent, a self-insured, and claimant both appeal from an Award entered by Administrative Law Judge Jon L. Frobish on October 12, 1998. The Appeals Board heard oral argument April 9, 1999, in Wichita, Kansas.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared on behalf of claimant. E.L. Lee Kinch of Wichita, Kansas, appeared on behalf of respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge found claimant is entitled to temporary total disability benefits for the period October 8, 1997, through February 16, 1998, and a 20 percent permanent partial general disability. The permanent disability awarded is a work disability based on a task loss of 45 percent and a wage loss of 25 percent averaged pursuant to K.S.A. 1996 Supp. 44-510e and then reduced pursuant to K.S.A. 1996 Supp. 44-501 by 15 percent for a preexisting disability.

On appeal, respondent contends claimant is not entitled to a work disability and should be limited to compensation based on 5 percent functional impairment because the more credible medical evidence establishes that he remains able to perform all the tasks he performed in the work he did during the 15 years preceding his compensable injury.

Respondent also contends claimant is not entitled to the temporary total disability

compensation from the date claimant left employment for respondent, October 8, 1997, to the date claimant returned to work. Respondent objects to temporary total disability benefits during that period because claimant had been released from medical care without restrictions by several physicians and even though one physician had recommended restrictions, those restrictions did not make claimant temporarily totally disabled. Finally, if claimant is awarded temporary total disability benefits for this period, respondent points out the benefits were ordered to be paid until February 16, 1998, when, in fact, claimant began working on January 17, 1998. At the time of oral argument for this appeal, claimant's counsel agreed that claimant returned to work on January 17, 1998.

Claimant agrees with the findings by the Administrative Law Judge regarding the extent of work disability but contends the disability should be reduced by only 5 percent for preexisting disability, not 15 percent. Claimant asks for temporary total disability but agrees it should end January 17, 1998.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the deduction for preexisting disability shall be only 5 percent and claimant should be awarded benefits for a 30 percent work disability. But the Board finds claimant should not be entitled to temporary total disability benefits for the period from October 8, 1997, through February 16, 1998.

Findings of Fact

1. Claimant injured his low back April 13, 1996, when his chair slipped out from underneath him as he rolled the chair towards a computer. Claimant landed on the floor.

2. Claimant was treated initially at the Minor Emergency Center and was taken off work. Claimant was next treated by Dr. Kris Lewonowski, an orthopedic surgeon who, in turn, referred claimant to Dr. Michael H. Munhall, a physiatrist.

3. Dr. Munhall first saw claimant May 31, 1996. Claimant presented with complaints of back and right leg pain. Dr. Munhall ordered an EMG study and concluded there was no evidence of lumbosacral radiculopathy in either the right or left leg. Based on clinical findings, Dr. Munhall diagnosed SI dysfunction syndrome and numbness from a small sensory nerve entrapment in the right leg. Dr. Munhall prescribed physical therapy.

Dr. Munhall thereafter saw claimant weekly until he released claimant to modified work beginning July 16, 1996. As of July 24, 1996, Dr. Munhall concluded the SI joint dysfunction had resolved and he released claimant without restrictions. He rated the impairment as 7 percent of the whole body. On October 22, 1996, claimant returned to Dr. Munhall complaining of an acute onset of right lumbosacral pain. This time Dr. Munhall released claimant to return to work on a trial basis. Claimant did not thereafter return to

Dr. Munhall. Dr. Munhall testified he would defer to Dr. Mills' restrictions if Dr. Mills saw claimant last but also testified he could not say he would have agreed with Dr. Mills if he, Dr. Munhall, saw claimant when Dr. Mills did.

4. Dr. Larry K. Wilkinson, and other physicians in Dr. Wilkinson's office, also saw claimant on several occasions between April 1996 and July 1997. The other physicians saw claimant first, and Dr. Wilkinson began seeing claimant on October 8, 1996. Dr. Stopp of his office had taken claimant off work on October 3, 1996, and Dr. Wilkinson released claimant to light duty as of October 29, 1996. As of November 15, 1996, Dr. Wilkinson released claimant with no restrictions.

On March 11, 1997, claimant returned to Dr. Wilkinson again complaining of low back pain. Dr. Wilkinson put claimant on light duty and referred him to Dr. Bernard T. Poole. After seeing Dr. Poole, claimant returned to Dr. Wilkinson, and Dr. Wilkinson released claimant without restrictions on July 10, 1997.

Throughout the period of treatment, Dr. Wilkinson diagnosed chronic low back pain.

5. Dr. Poole first saw claimant March 17, 1997. He diagnosed degenerated and unstable L4-5 disc interval. Dr. Poole saw claimant on several subsequent occasions and on June 30, 1997, the examination was completely normal. Dr. Poole stated claimant could be released to return to work without restrictions but advised claimant should use good body mechanics when doing anything strenuous.

6. Dr. Poole scheduled a follow-up visit for August 11, 1997, but claimant did not show up for this exam.

Instead of going to Dr. Poole, claimant sought and obtained an Order for a change of physicians. Following a preliminary hearing, the Administrative Law Judge required respondent to furnish the name of three physicians from which claimant was allowed to choose. Claimant chose Dr. Phillip R. Mills.

7. Dr. Mills first saw claimant September 22, 1997. Dr. Mills reviewed the earlier MRI study and agreed that it showed a bulging disc. He diagnosed chronic back and cervical strain with probable polyneuropathy secondary to his diabetes. He rated the impairment from the April 1996 injury as 5 percent of the whole body and recommended restrictions relative to the April 1996 injury as follows:

> Eight hours a day five days a week lifting 30 pounds, a stand/walk four to six hours, sit one to four hours, hands bilaterally okay for repetitive movement, bending occasionally, squatting frequently, twisting not at all, climbing frequently, push/pull 25 pounds occasionally, reach overhead continuously.

Dr. Mills concluded, at the first visit, that claimant would not likely benefit from further treatment except from time to time for flare-ups. Claimant returned to Dr. Mills on

several occasions after this first visit and Dr. Mills continued to provide conservative treatment, primarily medication, through June 1998.

8. Effective October 8, 1997, respondent placed claimant on a medical leave of absence because he indicated he could not perform his duties as youth counselor. Respondent chose to rely on the opinions of Dr. Poole and Dr. Wilkinson who released claimant without restrictions rather than the opinion of Dr. Mills who recommended restrictions. Based on their opinions, respondent took the position that claimant should be able to perform the duties he had been performing as a youth counselor.

9. In January 1998, respondent offered claimant the alternative of returning to a job as a youth counselor or taking a job as a control booth operator. Claimant accepted the job as a control booth operator and began on January 17, 1998. In the new position claimant earned 25 percent less than he did at the time of the injury.

10. Drs. Wilkinson, Munhall, Poole, and Mills all testified regarding claimant's ability to perform tasks.

Dr. Wilkinson reviewed a list of the tasks claimant performed in the 15 years of work before this injury. He opined that, with the exception of one task which involved lifting over 300 pounds, claimant could do all of those tasks. Dr. Wilkinson testified that he seriously doubted the task actually required that he lift over 300 pounds and further testified that he would restrict anyone from lifting over 300 pounds.

Dr. Munhall also testified claimant should be able to perform all the tasks listed for the 15 years of work before the accident, again excepting the task of lifting over 300 pounds. Dr. Munhall doubted that claimant was able to lift over 300 pounds before this accident.

Dr. Poole reviewed the list of tasks claimant had performed in the relevant 15 years of work and concluded claimant could perform all of those tasks.

Dr. Mills opined that claimant cannot do 15 of 33 tasks on the list or 45 percent.

11. Claimant settled a workers compensation claim for injury on September 3, 1981, to his low back which occurred while working for another employer. The settlement was based on a 15 percent permanent partial disability. Dr. Ernest R. Schlachter and Dr. Dennis R. Finley examined claimant for this earlier injury. Dr. Schlachter rated the impairment at that time as 15 percent and Dr. Finley found no impairment.

Dr. Schlachter testified in this case that if he were to use the Fourth Edition of the AMA *Guides to the Evaluation of Permanent Impairment* he would rate the impairment he found for the 1981 injury as a 5 percent impairment.

Dr. Finley also testified in this case and agreed that some would give a 5 percent rating under the Fourth Edition of the AMA Guides for the condition in 1981.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1996 Supp. 44-501(a).

2. The Board concludes claimant was not temporarily and totally disabled during the period of October 8, 1997, through February 16, 1998. The Board agrees with the Administrative Law Judge that it is appropriate to rely on the opinions of Dr. Mills in this case but disagrees as to the consequences of doing so. Dr. Mills rated and released claimant with restrictions as of September 22, 1997. By all medical testimony, claimant had reached maximum medical improvement at that point. Whatever disability he had was, therefore, permanent, not temporary. And the rating and restrictions recommended by Dr. Mills do not indicate claimant was totally disabled.

3. The Board finds, as did the Administrative Law Judge, that claimant has a 25 percent wage loss and a 45 percent task loss. The wage loss is a comparison of claimant's actual post-injury wage to the pre-injury average weekly wage. The task loss is based on the opinion of Dr. Mills. In view of the nature and persistence of claimant's complaints, the Board finds Dr. Mills' recommendation for restrictions appropriate for claimant's injury. The task loss and wage loss averaged in accordance with K.S.A. 1996 Supp. 44-510e yield a 35 percent work disability.

4. K.S.A. 1996 Supp. 44-501(c) provides that any award of disability must be reduced by the extent of preexisting disability. In this case the Board finds the preexisting disability was 5 percent. This conclusion relies on the testimony of Dr. Schlachter that the preexisting impairment would be 5 percent if measured according to the AMA Guides. The current statute requires that functional impairment be based on the AMA Guides and, in our view, the comparison is most appropriate if the preexisting functional impairment is measured by the same criteria.

5. With the 5 percent preexisting deducted from the 35 percent work disability, claimant is entitled to benefits based on a 30 percent permanent general disability.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on October 12, 1998, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Delmar Hollon, and against the respondent, Sedgwick County, a qualified self-insured, for an accidental injury which occurred April 13, 1996, and based upon an average weekly wage of $560.42, for 32.58 weeks[1] of temporary total disability compensation at the rate of $326 per week or $10,621.08, followed by 119.23 weeks at the rate of $326 per week or $38,868.98, for a 30% permanent partial disability, making a total award of $49,490.06, all of which is presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
E.L. Lee Kinch, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

[1] The Administrative Law Judge included in his award only the 18.86 weeks which were in dispute for the period from October 8, 1997, through February 16, 1998, but respondent advised at the start of the regular hearing that it had paid 32.58 weeks of temporary total disability before the disputed period. This Order is intended to award amounts respondent has paid and which were not in dispute.